INFORMATION

Malpractice Claims Prevention Programs

Are They Worth While?

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ARE MALPRACTICE CLAIMS prevention programs worth while? Suppose we break that question into several pieces and examine each in an effort to discern the underlying factors that cause the question to be posed.

First: "What is to be *prevented*?"

To answer this, a brief historical review is appropriate. Regan tells us that in the decades between 1900 and 1940 there was a 540 per cent increase in the number of malpractice cases that reached the appellate courts in the United States as a whole. In the year 1940 the total number of such cases was 33. In 1953 there were 32.

These years were picked at random. They indicate a plateau, which practical experience confirms. The volume remains at least five times the 1900 incidence.

Dr. Regan's statistics demonstrate the tremendous rise in the incidence of malpractice suits in the past fifty years. Further, a little research in a law library discloses that the increase is perhaps more noticeable in the largest metropolitan centers, but that it is by no means confined to any one area. It cannot be localized.

Lest physicians assume that they are being singled out by the public for special torture, it must also be understood that all forms of personal injury litigation have dramatically increased since World War I. Mass production of the automobile has wrought many changes, one of them being increased frequency of accidental injuries or death and increased resort to law for redress.

When people become suit-conscious in general, they tend to think in terms of legal action for any and all real or fancied grievances. Fifty years ago a guest in a home would consider it ungentlemanly to sue his host because after the third martini he wandered through a plate glass window. Nowadays suits of this type are not too uncommon.

With the public litigation-conscious, there is a tendency to commence legal action, not only when warranted, but also when there is just a bare chance of recovery; sometimes even when there is no legitimate cause for complaint.

Within the field of professional liability, the main activity that can be "prevented" is the fraudulent or false or vindictive or long-shot suit that is not based on just cause. The meritorious action not only cannot be prevented, but ought not be impeded. However, to separate the sheep from the goats and thereby reduce the incidence of nuisance claims would drastically curtail professional liability actions, and of itself is a justifiable reason for a claims prevention program.

Second: "What is malpractice?"

"Malpractice" is the commonly used term to describe the liability at law of physicians and surgeons for torts committed during the course of their practice. Properly stated, it is "professional tort liability." A "tort" is a violation of one's duty to use reasonable precaution for the safety of others, resulting in an injury to another.

By law, we are all obliged at all times to be reasonably careful of the safety of others. If one of a group of people seated together in a room, for example, should suddenly jump up, knocking over his chair in the process, and if the chair injured the person sitting behind him, he might find himself the defendant in a tort action for having failed to use ordinary care.

As applied to physicians, the law requires that each physician possess the average skill found amongst fellow-practitioners doing the same work in his own community, and that he at all times exercise ordinary prudence and thoughtfulness in the application of his skill to his patients. The failure to live up to these obligations is called "malpractice."

The ordinary personal injury suit against the average person involves his pocketbook only. Hence, if he is adequately insured he gives the fact of a suit against him very superficial concern.

But to a physician, or any other professional man, a professional liability suit involves something else that is much deeper, much more important. His professional reputation, his very livelihood, his pride and his self-respect are all at stake. In his mind, it is an accusation akin to a charge of dishonorable conduct. It is humiliating.

Therefore, we must not look solely to the financial aspects of malpractice.

Each physician, in order to avoid the humiliation of a liability suit, must become thoroughly familiar with the various rules of law, that together, constitute the law of malpractice. He must intimately know the rules of the game.

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Medical schools are not law schools. Hence the practicing physician must acquire his knowledge of the law that governs him after he is in practice, and he may acquire this knowledge either haphazardly or systematically. He will pick up his concepts either on a hit-or-miss basis from dubious sources or he will acquire it in an orderly fashion from teachers who know at least as much as the student.

A systematic, well-organized professional educational program in the field of malpractice has the possibility of achieving a tremendous reduction in the incidence of malpractice claims and suits. By educating physicians to their legal responsibilities and to the required conduct in carrying out those responsibilities, approval of the law, of the public and of patients may be obtained and maintained.

Malpractice has another most important facet that must be understood in any discussion of a claims prevention program.

All physicians today are, or ought to be, insured against professional liability. This insurance, however, is far from the ordinary run-of-the-mill public liability coverage.

It is true that the legal theory underlying responsibility for running down a pedestrian or for burning a patient with an ultraviolet lamp are one and the same; but beyond that, all resemblance ceases. From the moment of knowledge, the investigation, claims analysis, preparation for defense, and defense of an automobile personal injury case are standardized, not too difficult to master, and fit into the ordinary operations of any insurance claims department or law office.

The investigation, the claims analysis, the preparation for defense, and the defense against a malpractice claim are not in any way comparable to these factors with regard to other personal injuries. An investigator must know enough about the practice of medicine to be able to know what to investigate when a claim of malpractice has been made. The analysis of the results of the investigation requires expert medical judgment. The defense of a malpractice case in court involves specialized training in this field. The rules of evidence and the substantive rules of law are different than in the ordinary personal injury case. The lawyer must understand the medical aspects thoroughly, so that he can communicate in ordinary English to the judge and jurors the issues and facts involved.

Recently, I appeared in Federal Court at Salt Lake City, and while awaiting the commencement of our trial, I sat in the courtroom and observed the case that preceded us, which was a suit by the Navajo Nation against the United States for damages resulting from the destruction of Navajo horses by agents of the United States Indian Service. The witnesses were all Navajo Indians who could not speak English and interpreting was necessary. Each question was translated by the interpreter into Navajo; when the witness replied, the interpreter translated the answer. The net result was that the trial took twice as long as it would have if court, jury, counsel, and witnesses all spoke in a commonly understood tongue.

This is an extreme example, but a malpractice trial is similar. Medical terms must first be understood by counsel, and then converted into language understood by judge and jurors.

It is obvious that insurance companies that have a few malpractice policies outstanding in a community cannot afford to set up separate specialized malpractice claims departments or employ attorneys who specialize in malpractice defense. Premium volume is too small to warrant tailor-made or custom handling. To justify expenditure of funds for special treatment of malpractice policies, there must be a substantial volume, which means all or most of the physicians over a large area.

An insurance carrier, unless it has a large volume, cannot afford the further expense of a specialized prophylaxis or prevention program. Fire insurance companies, with all of their business at risk, can afford to spend substantial sums of money in fire prevention programs. Workmen's compensation insurers, with hundreds of thousands of employees insured, can afford to spend money on safety programs. But an insurer with a few hundred scattered physicians insured simply cannot do so.

One essential of insurance is spread of risk. The whole field of physicians' professional liability in the United States is limited to approximately 160,000 physicians. If one company insured all, the insurance base would be minor, as compared to twenty million automobile owners, or fifty or sixty million homes, or the sixty to seventy million people covered by workmen's compensation.

Hence, one of the inherent problems in malpractice insurance is the limited market and the consequent limited ability of any one carrier to conduct the equivalent of a safety program.

Third: "What is a *program*?"

In northern California, 23 county medical societies now have professional liability insurance contracts with the same insurance carrier, American Mutual Liability Insurance Company. In all, close to four thousand physicians are participating. While each county has it own group contract, the program is substantially the same from Fresno in the south to Siskiyou in the north.

Each county has a medical committee. In the early stages of each claim against a physician, the facts are fully investigated by claims representatives of the insurer, who devote their entire time to this type of work. As claims adjusters, they are "specialists" in professional liability work.

When the case is investigated, the facts are then submitted to the society's medical committee. The members of the committee discuss and debate the case, sometimes call for more investigation, sometimes ponder their decision at length, on other occasions reach a conclusion fairly rapidly.

In any event, the committee satisfies itself that it has considered all the material facts, and then recommends either—

1. That the claim has merit and that the claimant should be fairly compensated; or

2. That the facts do not disclose any medical dereliction on the part of the accused physician, and that the case should be defended.

To date, in each instance the insurance carrier has abided by the recommendations of the appropriate committee.

The functioning of the society's committee does not, however, terminate with recommended action. If it has recommended that the case be defended, the members of the committee then actively and voluntarily assist in the preparation of the defense and in the actual trial of the case. To the defense attorney, this is of invaluable aid. Incidentally, it reduces the cost of defense substantially.

Finally, the members of the various medical committees also appear before various professional audiences, and from their experiences undertake to explain to the practicing physician the legal pitfalls that beset a doctor and the conduct which should be adhered to to avoid legal liability.

The physicians who serve on these committees obtain "occupational experience." They know from having experienced specific cases what the problems are, and what information a physician needs in order to conduct "good practice" rather than "bad practice."

Admittedly, the program in California is far from perfect. A great deal more could be done, and should be done, to inform all physicians of their legal obligations, and to enable them to avoid the humiliation of a malpractice suit.

More manpower than has been available to date is no doubt needed. But at least we believe that this program is a sensible beginning. We feel that malpractice claims are intelligently analyzed, and that time and money is not wasted in endeavoring to defend the indefensible. On the other hand, unwarranted claims are discouraged in that nuisance settlements are not made. If the case is unjust it is defended; it is not settled, no matter how cheap it can be bought.

Physician participation in the trial of cases is obtained on a voluntary cooperative basis, and above all the physicians who serve on the medical committees become experienced in and aware of the problems involved, and are able to do missionary work amongst their colleagues.

It takes years for the results of such a program to become really measurable. We feel that at least ten years, and probably fifteen years, must elapse—and we are now only in the fifth full year—before any reliable inventory can be made.

However, the results to date indicate to us who are close to the picture that we have at least halted that steady increase in the incidence of malpractice claims and suit, noted by Dr. Regan, that commenced early in the century and that has continued without interruption for fifty years.

There are a few specific observations that are somewhat beside the principal theme of this address, but that are most important and ought not to be ignored in considering the value of any prevention program.

1. The incidence of malpractice claims is in inverse ratio to the degree of personal relationship between physician and patient. The more impersonal and aloof a physician is, the more critical the patients are bound to be.

2. The confidence of a patient in his physician is rudely jolted when another physician makes sarcastic or derogatory comments. The roots of many malpractice cases are embedded in such remarks as "What butcher performed that operation?" or, "How in the world could he have missed it?" The physician, like all of us, must sell himself. The art of salesmanship is not easily acquired and the amateur usually does the wrong thing. He builds himself up by knocking others. Actually, that is poor salesmanship. The expert salesman ignores his competitor and concentrates on establishing confidence in himself.

3. Even the poor have pride, and a certain way to wound deep personal pride and self-respect is for a physician to send a bill that his patient cannot pay and in so doing humble the patient to the point where he has to ask for charity. Many a malpractice case has its roots in the thoughtless handling by a physician of the financial side of his practice. The bill does not have to be exorbitant to cause anger and resentment; it can be reasonable, but if it humiliates, resentment is immediately aroused. A little tact and a little inquiry before billing could save many a headache.

4. Lawyers soon learn not to believe everything that their clients tell them. People have a habit of stating as fact that which they would like to believe, not the cold cruel reality. Many physicians find it difficult to realize that the tales their patients tell them may not necessarily be true. Consequently, a patient who is shopping will tell a physician a tall story about treatment that he received from another doctor; the physician accepts it as true, and comments accordingly; next year, he is in court.

5. Inherently, malpractice prevention is entwined with malpractice insurance. The insurance obtained

must be adequate and the carrier *interested.* Insurance is a commodity, it comes in different prices and packages and is produced to fit a market. If one buys the cheapest policy, one gets exactly what is deserved—the lowest quality. For physicians to buy malpractice insurance solely on the basis of price, is, to my mind, foolish. Recently, a California physician cancelled his group coverage because he could save ten dollars elsewhere. He said, "We feel that with today's competitive prices we have to be on the lookout for savings." So will his carrier when he is faced with a claim of malpractice. Then he will learn. A malpractice prevention program and basement bargain sales are incompatible with each other. A safety program costs money, whether it involves your home, factory or profession.

These, then, are some of the reasons why a prevention or safety program is worth while and why to undertake it requires group, rather than individual, action.

If by now anyone doubts the need for control of "malpractice" suits, allow me to quote from the May 1954 issue of the American College of Radiology News Letter:

"There are many reasons why the entire medical profession today finds itself in the same position that radiology was in 20 years ago. Here are some of the recent causes that have gone into the pot to make hospital and physicians' liability insurance even more undesirable from the underwriters' standpoint: increased demand for medical and hospital care; legislation increasing hospital liability; specialization, excessive fees; increased public 'claim consciousness'; bad hospital public relations; hospitalization insurance; dollar 'madness'; court interpretations broadening liability in this field; increased costs of legal work and investigation.

"The most potent factor, however, is the ever spiraling inflation and dollar devaluation—to which there seems to be no end—and which has resulted in fantastic judgments being rendered by juries in personal injury and malpractice suits."

Again, quoting from the same article in connection with the problem of lack of interest by insurance carriers:

"Some few of the companies are reluctantly writing business at the Bureau rates. One company will write for only their own agents and will cover x-ray therapy, providing the assured has been certified by the American Board of Radiology or is a member of the American Roentgen Ray Society or the Radiological Society of North America. Another company will write for its own agents only and will not write or renew existing policies for brokers. In addition, the applicant must promise the company all of his insurance business as collateral."

Physicians are in jeopardy until the insurance industry again is *interested* in insuring them. This will not occur unless and until the risk in professional liability insurance is lessened materially. The *risk* won't decrease of its own accord. A real, vigorous and widespread but grass roots program—by the medical profession itself—to educate its members to their legal duties, to advise and assist when trouble brews, and to fight relentlessly all unjust claims, is the only prudent course of action, if disaster is to be avoided.

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